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No. 84-1321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CRISPUS NIX, WARDEN,
Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the defense lawyer erroneously conclude that his client's prospective testimony was in part perjurious?

2. Did the defense lawyer, by threatening to withdraw, to disclose potential client perjury and to testify adversely against the client, create an irreconcilable conflict between himself and his client, forcing his client to limit his testimony, and thereby deprive his client of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, to testify on his own behalf and to have the effective assistance of counsel?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The National Association of Criminal Defense Lawyers (NACDL) submits this brief as amicus curiae with consent of Petitioner and Respondent[1] in support of Respondent Emmanuel Charles Whiteside. Amicus urges that the decision of the United States Court of Appeals for the Eighth Circuit in these proceedings, *Whiteside v. Scurr,* 744 F.2d 1323 (8th Cir. 1984), be reversed in part and affirmed in part.

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[1]Copies of Petitioner's letter of consent dated July 2, 1985 and Respondent's letter of consent dated June 13, 1985 have been submitted to the Clerk of this Court along with this Brief, pursuant to Sup. Ct. R. 36.2.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership comprised of nearly 5,000 lawyers, including representatives of every state. N.A.C.D.L. was founded 26 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowlege of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of criminal defense lawyers. Among N.A.C.D.L.'s stated objectives is the promotion of proper administration of criminal justice. Consequently, N.A.C.D.L. concerns itself with the protection of individual rights, and the improvement of criminal law, its practices and procedures.

The members of N.A.C.D.L. are continuously engaged in the defense of criminal cases statewide and nationwide. The responsibilities of the criminal defense lawyer when faced with the infrequent case of the client perjuror are difficult and complex. The members of N.A.C.D.L. share the philosophy that the Constitution demands and requires that the defense attorney be an independent advocate and that client confidential communications not be used by the advocate to visit substantial harm on the client by this advocate.

Because of the constitutional significance of the issues in this case and because of the nationwide impact this Court's opinion will have on defense lawyers, N.A.C.D.L. respectfully asks leave of the Court to file this brief in support of Respondent in this case.

STATEMENT OF THE CASE

No separate statement of the case will be presented in this amicus brief. The relevant facts and procedural matters are incorporated into the Argument section below.

SUMMARY OF THE ARGUMENT

The law and attorneys' ethics requirements prohibit the knowing use of perjured testimony. Lawyers cannot, however, assess their own clients' credibility and characterize their clients' testimony as perjurious based upon conjecture, surmise, or mere inconsistencies. In this case, there is a serious question whether the defendant's testimony would or would not have been perjurious. Counsel for Emmanual C. Whiteside lacked the "firm factual basis" upon which to predicate this conclusion, which had far-reaching consequences, that his client intended to perjure himself at his own trial. Acting prematurely, counsel threatened to withdraw, to disclose to the judge the details of the suspected perjury, and to testify against the client, should the client testify to the facts which the lawyer concluded were perjurious. The defendant thus truncated his testimony. The fact-finder was deprived of hearing the defendant's full account of his state of mind at the time of the killing which was the only issue raised on the merits of the case. This inappropriate judgment of counsel set up an irreconcilable conflict of interest between the client and the lawyer, ultimately preventing the fact-finder from hearing facts which may have affected their verdict. The multiple threats of defense counsel (to withdraw, inform and testify) forced Whiteside to choose between his right to the effective assistance of counsel and his right to testify on his own behalf. By foisting this Hobson's choice upon Whiteside, counsel abandoned his role

of an advocate and in so doing, deprived Whiteside of both his right to effective assistance of counsel and his constitutional right to testify. The Constitution cannot condone counsel's actions, nor can the courts continue to permit criminal defense lawyers to harm their own clients by revealing confidential communications which fall far short of prospective perjury.

This Court is urged to resolve for criminal defense lawyers the insolvable dilemma of what to do when faced with the perjurious defendant, a situation not necessarily presented by the facts of this case. It is important to the administration of criminal justice that the defense counsel have the right and power to comply with the law on criminal defendant perjury without incriminating his or her client, without incurring the risk of a malpractice suit or a finding of incompetency, and without facing professional discipline and/or criminal charges. Accordingly, Amicus requests counsel, in a client perjury situation, be permitted to withdraw without stating any reasons or disclosing any client confidences if counsel cannot successfully dissuade his client from testifying untruthfully. If the motion to withdraw is denied, counsel should then continue to represent his client as he or she would any other criminal defendant, including full examination of him and full right to argue the client's case in closing. Any other resolution results in the attorney signalling to the judge that perjury is in progress, for which a judge may impose increased penalties, and telegraphing to the jury that the client is a liar. Counsel would effectively be implicating his client in one crime at the very point at which he is to be defending him against another.

This insolvable dilemma should be solved by this Court so that defense lawyers can continue to afford, rather than deprive, their clients of their constitutional rights.

ARGUMENT

I. WHITESIDE'S LAWYER'S ACTS OF PREMATURELY MISLABELLING HIS CLIENT'S TESTIMONY AS PERJURIOUS AND HIS MAKING MULTIPLE THREATS TO WITHDRAW, INFORM THE COURT OF THE DETAILS OF WHITESIDE'S POTENTIAL PERJURY AND TO TESTIFY AGAINST WHITESIDE CREATED AN IRRECONCILABLE CONFLICT OF INTEREST BETWEEN HIMSELF AND WHITESIDE WHICH DEPRIVED WHITESIDE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO TESTIFY.

A. The facts of this case do not establish a firm factual basis for the defense lawyer to conclude that Whiteside was going to commit perjury.

One startling aspect of this case can be overlooked no longer. A serious question exists whether any perjury problem actually is involved in *Nix v. Whiteside;* no canon, code, or case law may support the lawyer's branding of his own client in this case a potential perjuror.

This Court's decision in *Sumner v. Mata,* 449 U.S. 539 (1981) enforcing the habeas corpus statute's "presumption of correctness standard" permits review of this issue by this Court. Although the instant case became a federal matter under 28 U.S.C. § 2254, the factual determination of the Iowa court is "not fairly supported by the record", *Id.* § 2254(d).

Canon 7 of the Model Code of Professional Responsibility (1980) cautions the lawyer to "represent a client zealously within the bounds of the law." The Model Code accordingly, prohibits a lawyer's *knowing* use of perjured testimony. Model Code of Professional Responsibility, DR 7-102(A)(4) (1980) (emphasis added). *Accord,* Model Code of Professional Responsibility, EC 7-26 (1980). The Model Rules of Professional Conduct[2], similarly prohibits

[2]Active study of the Model Rules is underway at the present time in Iowa, but no established date has been set for completion of the study.

similarly prohibits the lawyer from offering evidence he *knows* to be false. Model Rules of Professional Conduct 3.3(a)(4) (1983) (emphasis added). The Comment to Rule 3.3., adopted by the ABA House of Delegates along with the Rule, may indeed exempt from coverage of the Rule the criminal defense lawyer whose client intends to commit perjury. Model Rule 3.3 comment, Constitutional Requirements. The Comment however, also recognizes that the ethical issue arises only when the "accused insists on testifying when the lawyer *knows* that the testimony is perjurious." Model Rule 3.3. comment, Perjury by a Criminal Defendant (emphasis added). The ABA Standards for Criminal Justice: The Defense Function (2d ed. Supp. 1982) Proposed Standard 4-7.7 on client perjury, which for other reasons, was formally withdrawn prior to its submission for approval and never revived, *Id.* at 95, Editorial Note, only operated "[i]f the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true . . ." Proposed Standard 4-7.7(a). The predecessor ABA Standard 7.7, with a similar provision, was in effect at the time of Whiteside's trial, although it was deleted from the Standards in early 1979.

The cases are in agreement that counsel's ethical duties regarding client perjury are triggered if, and only if, counsel has "a firm factual basis" for the conclusion that the defendant's testimony will be false. *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115, 122 (3d Cir. 1977). In *Wilcox,* the defense attorney "believed" her client would be committing perjury if he took the stand to deny any and all involvement in a rape. Counsel was unable to

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The ethics provisions of the Iowa Code of Professional responsibility for Lawyers are predicated on the identical corresponding provisions of the ABA Model Code, cited herein.

recall the basis for this belief. *Id.* at 117, 122. No other evidence on the record showed that the defendant would have been a perjurious witness. *Id.* at 122. The court condemned counsel's disclosure of her "private conjectures", *id,* and reminded her that "[i]t is the role of the judge or jury to determine the facts, not that of the attorney." *Id.*

Two years later, a case arose in the District of Columbia Court of Appeals in which the veracity or falsity of the defendant's testimony was also "conjectural". *Johnson v. United States* 404 A.2d 162, 164 (D.C. 1979). The appeals court unequivocally ruled that "the ethical dilemma does not arise" in such a case. *Id.* The trial judge in *Johnson* twice requested proffers from the defense, both before swearing in the jury and after the government rested. Counsel complied, and the proffers regarding defendant's proposed testimony were inconsistent. The court concluded that the second version was perjurious, and directed the lawyer to proceed if at all, with but passive representation of the defendant – to use the narrative device for defendant's testimony and to refrain from arguing his client's testimony to the jury in the closing argument. The defendant chose not to testify. Following his conviction, the appellate court ruled that the trial court unconstitutionally and impermissibly imposed its restrictions on counsel. *Id. The court noted that "counsel did not believe his client's intended testimony would be perjurious and we are unable to conclude that the evidence warrants a contrary conclusion." Id.* at 165. The court said that the inconsistency between the defendant's two proferred defenses was insufficient to establish a perjurious intent on his part, *id.* at 164, and the trial court's contrary conclusion was based on "surmise". *Id.* Accordingly, the case was reversed and remanded for a new trial.

The District of Columbia Court of Appeals thus

distinguished, in 1979, between conjecture, surmise and conclusions drawn from inconsistent defense statements, on the one hand, and, on the other, actual knowledge of projected perjury based on a defendant's admissions and an attorney's independent investigation. *See id.*, and cases cited therein. In 1980, the same court again ruled, in *Butler v. United States,* 414 A.2d 844, 850-51 (D.C. 1980), that counsel does not *know* his client will commit perjury simply based on a client's inconsistent representations to his lawyer.

More recently, in 1982, the Superior Court of Pennsylvania, in *Commonwealth v. Wolfe*, 301 Pa. Super. 187, 447 A.2d 305, 310-11 (1982), joined the ranks of the courts requiring that counsel know "for a fact", "know for sure" that his client will present perjurious testimony in this type of situation. "He must not merely suspect it." *Id.* at 310 n.7. Instead, in *Wolfe*, "once the lawyer decided that the proposed . . . testimony was false, he threw up his hands and abandoned the attempt to defend his client." *Id.* at 311.

In sum, as the Third Circuit stated in *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122:

> It is apparent that an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured. To do so would undermine a cornerstone of our system of criminal justice.

In the case at bar, the lawyer did not actually disclose to the Court his projection that perjury would occur at trial; instead, the lawyer effectively kept out the questionable testimony by threatening his very own client with the specter of the lawyer's withdrawal, disclosure to the Court of the suspected perjury, and appearance as an adverse wit-

ness at trial. *Whiteside v. Scurr,* 744 F.2d 1323, 1326 (8th Cir. 1984). This was not necessarily a case in which a lawyer "nip[ped] perjury in the bud," *Whiteside v. Scurr,* 750 F.2d 713, (8th Cir. 1984) (denial reh'g en banc) (Fagg, J., dissenting). Rather, this is a case in which a lawyer prematurely presumed perjury and unnecessarily turned himself into his client's adversary instead of his advocate. The facts show[3]:

Emmanuel Charles Whiteside was charged with murder for the 1977 stabbing death of Calvin Love. During an argument in Love's apartment, at which two of Whiteside's friends and Love's girlfriend were present, Whiteside stabbed Love as Love was moving toward him. Whiteside's defense was that Love had been reaching for a gun beneath a pillow, and that Whiteside acted in self-defense. Whiteside told his lawyer he had not actually seen a gun, but that he thought he had[4] and that he was convinced Love had a gun, based on Love's reputation for carrying a gun. The others at the argument said they had seen no

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[3]The factual rendition in this brief is based on the Eighth Circuit's reporting of the facts.

[4]The Iowa Supreme Court incorrectly concluded that Mr. Whiteside had some "dishonest and deceitful scheme", *State v. Whiteside*, 272 N.W. 2d 468, 471 (Iowa 1978), based in part on defendant's statement that he had to testify that Love had a gun if he hoped to be acquitted. His lawyer, however, explained the law to Whiteside, to appease his anxiousness, by assuring him that the gun itself was not essential to the defense of self-defense, that the defense would be successful if the jury found that Whiteside reasonably believed Love had had a gun. 744 F.2d at 1325-26. The Iowa court, like defense counsel, however, concluded that defendant intended to testify that he had seen a gun, when he had earlier told counsel he had not. The record does not support that conclusion; there was nothing infirm about defendent's later recollection of a metallic object, an object he never claimed indeed to have been a gun. *See* argument, *infra.*

gun, but Whiteside's friends said they, too, believed Love probably did have a gun. Several hours after the stabbing, Love's girlfirend and family broke into the apartment and removed everything. Counsel learned of this private, surreptitious search during the course of his "investigation." It is not then surprising that a quick police search and counsel's own search uncovered no gun, nor that the apartment manager also found no gun. Further, no independent investigation conducted by counsel uncovered any fact(s) to support his surmise that Emmanuel C. Whiteside would lie under oath. If anything, counsel's investigaiton, which uncovered the fact of the girfriend and family's forced entry and emptying of Love's apartment, support Whiteside and his friends' belief that Love indeed had a gun in his home that day.

Counsel created the factual problem when, shortly before trial, Whiteside told him that he had seen something metallic in Love's hand just before the stabbing. The Eighth Circuit called this a "discrepancy," 744 F.2d at 1326, but indeed it is not.[5] Whiteside had earlier told his

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[5]In the denial of rehearing en banc, from which four judges dissented, one dissenting judge's opinion cited the Iowa Supreme Court's decision affirming the conviction. The fact that the defendant said that during the argument Love told his girlfriend to get his "piece" (gun), was said to "refute defendant's claim Love already had one." *Whiteside v. Scurr*, 750 F.2d 713, 715 (8th Cir. 1984) (Gibson, J., dissenting), quoting *State v. Whiteside*, 272 N.W. 2d 468, 471 (Iowa 1978). On the contrary, however, Whiteside had told his lawyer "he saw something metallic in Love's hand *just before the stabbing*." 750 F.2d at 715 (emphasis added). These two statements are not necessarily contradictory; Love could have told his girlfriend to get his "piece", then moved towards the pillow and for the gun (or some metallic object), himself just before Whiteside reacted in self-defense. At most, the defendant's statements are merely inconsistent, *see supra*, but the lawyer's conjectural conclusion was that his client was a would-be perjuror, a conclusion which is unsupported on these facts and under the

lawyer that he had not actually seen a gun, but that he had thought he had. He never contradicted this statement; he never said he had seen a gun. The metallic object, whatever it may have been, may well have been the reason, was certainly one of the reasons, why Whiteside, in is mind's eye, thought he had seen a gun at the time Love was moving toward him. Yet his lawyer apparently interpreted the recalled information regarding a metallic object to mean Whiteside was newly claiming he had actually seen a gun. At worst, Whiteside had made inconsistent statements;[6] on that basis, his lawyer stopped him from testifying about the metallic object. The lawyer's threats thus impermissibly curtailed the defendant's testimony; the jury found Mr. Whiteside guilty of murder in the second

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law. Note also that both the Iowa court and the dissenting opinion on rehearing cited above omit the significant fact that Love's girlfriend and family broke into and removed everything from his apartment within several hours of the incident; the two opinions do not mention that a search of the apartment shortly after Love's death disclosed no gun, a fact which – unfairly standing alone – is more damaging than when viewed in context, if indeed it is truly relevant to the issue of Whiteside's *belief* that there had been a gun.

[6]Inconsistent statements are commonplace occurrences in our courts. Such statements occur daily and are not intentional falsehoods but result because human perceptions are subjective, sometimes incorrect and sometimes influenced by the emotion of events. Trial attorneys are all too frequently surprised by the actual testimony of a client or a witness because it differs in some respect (a detail remembered or forgotten) than had been anticipated. This, however, is a far cry from saying the testifier will deliberately swear to a fact known to be false which is what Whiteside's lawyer concluded that Whiteside was doing.

degree, and the judge sentenced him to forty years in prison.[7]

In its opinion, the Eighth Circuit accurately observed, with regard to the "firm factual basis" which counsel must first have before the client perjury problem actually arises: "[i]t will be a rare case in which this factual requirement is met." 744 F.2d at 1328. The instant case is not, and never was, such a case. The defendant never admitted his guilt, nor any of acts which unquestionably showed guilt, nor did counsel's own investigation uncover anything to contradict his client's confidential communications. Yet, instead of remembering that he was to be his client's advocate, *id.*, counsel became the trier of fact; he judged his client's credibility, then improperly and irretrievably threw down the gauntlet with the spear of his multiple threats.

The Eighth Circuit erred, *see id.*, in presuming that the defendant would have testified falsely. Mr. Whiteside deserves a new trial in a different courtroom with different counsel – someone willing to represent him zealously within the bounds of the law.

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[7]The facts appear to lend credence to Whiteside's claim that he had a reasonable belief that Love was reaching for a gun and reacted to save his own life:

1. Love had a reputation for carrying a gun.
2. Witnesses to the killing believed that Love had a gun.
3. The police conducted only a quick search of the apartment for evidence.
4. Love's family and friends had broken the police padlock and removed all personal items from Love's apartment.

B. Whiteside's lawyer's actions of labelling his client's proposed testimony as perjurious and his making multiple threats to withdraw, inform and testify against Whiteside created a conflict of interest impairing the accuracy of the fact finding process and shattering the attorney-client relationship, which violated Whiteside's right to effective assistance of counsel.

1. Requirements of due process of law and effective assistance of counsel dictate that the criminal defense lawyer perform the role of an advocate and not that of a judge of his own client.

The Sixth Amendment requires defense counsel to protect and not to deprive the accused, the client, of his or her constitutional rights. When placed in a conflict position between lawyers' ethics and the client's constitutional rights the lawyer must act to ensure and afford the client's rights. The Eighth Circuit aptly observed:

> As the ABA Model Rules 3.3 comment, appendix B, states, the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics.

Whiteside v. Scurr, 744 F.2d 1323, 1327 (8th Cir. 1984) (appendix omitted).

Our system of justice is built upon the advocate's independence and responsibility to advocate:

> A man's rights are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, "I want your advocacy, not

> your judgment; I prefer that of the Court." *Johnson v. Emerson,* L.R. 6 Ex. 329, 367 (1871).

The Court has focused, as recently as last year, in *Strickland v. Washington,* 466 U.S. ____, 104 S.Ct. 2052 (1984) on the key role of the criminal defense lawyer in the fair and effective operation of the adversary system. The fair trial right, guaranteed through the Due Process clauses, is, in part, defined by the Sixth Amendment right to counsel and encompasses the defendant's fundamental right to testify in his own defense.

In the *Strickland* case, this Court recognized that "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." 466 U.S. at ____, 104 S.Ct. at 2065.

Canon 7 of the Model Code of Professional Responsibility (1980) similarly requires the defense lawyer to act as a zealous advocate for his client. Canon 4 accordingly cautions the lawyer to preserve the confidences and secrets of a client. DR 7-102(B) of the Model Code exempts a lawyer from revealing a fraud perpetrated by his client upon a tribunal "where the information is protected as a privileged communication." The Model Rules of Professional Conduct (1983), approved and adopted along with corresponding Comments by the ABA House of Delegates, though not yet formally adopted in Iowa, addresses, through the Comment to Model Rule 3.3, an even broader exemption of the criminal defense attorney from disclosure of client perjury:

> The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to

> defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Model Rule 3.3 comment, Constitutional Requirements.[8] Thus, again, the ethics requirements lead the Court back to the Constitution, to the due process, effective assistance of counsel, and right to testify protections which distinguish the criminal defendant from any other witness.

In *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115 (3d Cir. 1977), the court denounced [a criminal defense] attorney's unnecessary disclosures of the confidences of his client, stating that it "creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." *Id.* at 122. In the *Wilcox* case, counsel informed the judge, in a jury trial, of her client's (supposed) proposed perjury. The judge ruled that, if the defendant insisted on testifying as counsel had warned he would, counsel would be permitted to withdraw from the case, and the defendant would have to represent himself. This ruling, the appellate court held, impermissibly infringed both the defendant's right to testify and his right to the effective assistance of counsel. *Id.* at 120.

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[8]Standards for Criminal Justice: The Defense Function, Proposed Standard 4-7.7 also precluded counsel from disclosing client perjury to the court. *See infra,* however, regarding non-existence of any Standard on client perjury since early 1979.

The following year, in *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir. 1978), the Ninth Circuit Court also found a deprivation of due process in a client perjury case. In a bench trial, defense counsel abruptly ceased questioning the defendant on the stand and moved to withdraw, in chambers, refusing to state his reason. The withdrawal motion was denied; counsel asked no further questions of his client and argued the case without referring to the suspect testimony by the accused. The court ruled that counsel, by his actions, informed the trial judge of his belief that his client was a perjuror, thereby precluding a fair trial on the merits of the case, and openly placing himself in opposition to his client. *Id.* at 730. Thus, though counsel had not said a word to the court, his actions deprived the defendant of a fair trial. *Id.* The court condemned "such direct action as we find here, the addressing of the court in pursuit of court order granting leave to withdraw . . . conduct affirmatively and emphatically call[ing] the attention of the fact finder to the problem counsel was facing." *Id.* at 731. The court concluded, unhappily, that "fundamental requisites of fair trial have been irretrievably lost." *Id.* See also *Butler v. United States,* 414 A.2d 844 (D.C. 1980) (counsel's disclosure to trier of fact of client's intended perjury deprived defendant of due process).

Circuit Judge Hufstedler specially concurred in the *Lowery* case. 575 F.2d at 732. The judge did not disagree with the majority's due process analysis, but rested her opinion on the deprivation of the Sixth Amendment right to effective assistance of counsel. Judge Hufstedler stated:

> [W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to petitioner's interests as

to deprive her of effective assistance of counsel. No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense.

2. *The conflict of interest between the client (Whiteside's right to convey his full state of mind to the jury as he remembered it) and the lawyer (counsel's fear of personal consequences unless he forfeited Whiteside's right to tell the jury his full state of mind) was real, clear and constitutionally impermissible.*

Petitioner argues that Whiteside's lawyer had no actual conflict of interest and that no lapse of advocacy occurred affecting the adequacy of Whiteside's representation. (Brief of Petitioner, pp.20-23). This view of the record begs the constitutional question before the Court. Whiteside possessed a due process right to testify in his own defense. *Faretta v. California,* 422 U.S. 806, 819 N.15, (1975); *Brooks v. Tennessee,* 406 U.S. 605, (1972); *Harris v. New York,* 401 U.S. 222, 225, (1971); *In re Oliver,* 333 U.S. 257, 273, 275, (1948). Whiteside claimed that he acted in self-defense. The killing was witnessed by three persons and Whiteside admitted by his claim of self-defense that he caused Love's death. The only issue left for the fact-finder was to determine the actor's, Whiteside's, state of mind at the time of death – i.e. whether Whiteside possessed a reasonable belief that Love was going to kill him or do serious bodily harm at the time Whiteside acted in self-defense. Whiteside's fate hung on the jury determination of this issue and depending on its finding on this issue Whiteside could have been convicted or acquitted of any of a series of crimes ranging from first

degree murder (possessing an intent to kill, plus a state of mind of premeditation) or completely exonerated, acquitted (possessing "a reasonable belief that Love was going to kill or seriously harm him.")

Whiteside's pretrial statement to his lawyer that he saw something metallic in Love's hand just before the stabbing, is a critical and crucial part of his state of mind which was omitted from consideration by the fact-finder. Because another witness stated that Love told his girlfriend to get his "piece", [meaning his gun] does not mean that, in fact, Whiteside did not believe that Love had a weapon or that Whiteside did not, in fact, see something metallic in Love's hand [not a gun] before the stabbing. (See discussion, *infra* Section 1A, Footnote 5). Certainly, this additional fact could have been argued by the prosecution as being inconsistent with what the other witnesses said and inconsistent with the police search of Love's apartment. However, defense counsel for Whiteside could have argued that the words of Love to get his piece occurred before Love, in fa. ached under his pillow and grabbed his gun, or that Love had told his girlfriend to get his "piece" as a diversionary tactic so that he could proceed to shoot Whiteside as Love reached under his pillow to get his gun. Viewed from Whiteside's perspective the jury was denied the opportunity to consider this fact which was critical to his state of mind at the time of the killing.

When defense counsel engaged in multiple threats, and in particular when he told Whiteside that he was going to testify against Whiteside should Whiteside testify that he saw something metallic in Love's hand he became not a potential but a real and direct adversary to his client. The lawyer admitted at post-conviction hearings that he, as an attorney, could not ethically permit Whiteside to testify about the metallic object because he ". . . would be sub-

orning perjury . . ." [Pet. App.85]. The defense lawyer was concerned about his own involvement, facing possible criminal prosecution and defending himself in professional disciplinary proceedings. Unfortunately, defense counsel's hasty and premature judgment of his client's prospective testimony caused this irreconcilable conflict of interest. This conflict was not potential, but clear and apparent; it existed between the lawyer concerned about possible professional and personal recriminations against himself and the defendant who wanted to testify to the facts of the killing as he then remembered them.

It is difficult to imagine a more substantial conflict of interest between lawyer and client than this case: the defense lawyer volunteered to testify as a witness for the prosecution against his client concerning his client's confidential communications in the very case in which he had the duty to represent the client. Notions of client trust, loyalty and confidence between lawyer and client vanish. The defense lawyer was transformed from advocate to adversary when he said, "I am going to tell the Court and the jury that you are a liar." The attorney-client relationship was destroyed. And worse yet, as occurred in this case, the fact-finder was deprived of information necessary to a full and fair adjudication of Whiteside's claim of self-defense.

3. *The conflict between client and lawyer presumptively constitutes prejudice which denied Whiteside his right to effective assistance of counsel.*

In the opinion below, the Eighth Circuit adopted the appropriate test for prejudice in dealing with effective assistance of counsel claims as clarified by this Court in *Strickland v. Washington, infra:*

> "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally

> presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. . . . The Court further noted that ineffective assistance of counsel claims that involved conflict of interest warranted "a similar, though more limited, presumption of prejudice . . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.' " 104 S.Ct. at 2067, *citing Cuyler v. Sullivan,* 446 U.S. 335, 348, 350, (1980) (footnote omitted)

Whiteside v. Scurr, 744 F.2d at 1330.

The application by the Eighth Circuit of the limited presumption of prejudice was appropriate in this case because, in fact, there existed a serious conflict of interest between Whiteside and his lawyer which went to the heart of the reliability and accuracy of the fact-finding process. Whiteside offered abridged testimony solely because his own lawyer feared for the consequences that might personally befall him [possible criminal prosecution and professional disciplinary proceedings]. The conflict here was just as real as the conflict of interest discussed by this Court in *Cuyler v. Sullivan,* 446 U.S. 735, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980). In both cases because of conflicting interests between themselves and their clients, defense lawyers prevented potentially exculpatory evidence from being introduced at trial on behalf of the client. Whiteside's defense lawyer chose to place his own interests over those constitutional rights guaranteed his client when he foreclosed Whiteside's full testimony on the major issue in this case. Advocates should not place themselves in such direct conflict positions with their clients. Due process

standards do not permit the advocate to forfeit basic and fundamental constitutional rights of the accused as occurred in this case, and therefore, Amicus urges adoption of the limited presumption of prejudice when viewing the ineffective assistance of counsel claim presented by this case.

4. *In cases which pose the perjurious client problem it should be unconstitutional to require or allow the defense lawyer to forfeit his own client's fundamental right to testify.*

The perjurious client dilemma is a very real but infrequently seen problem faced by defense lawyers nationwide. As argued in Section IA., Whiteside's attorney created this dilemma when it appears not to have clearly existed. Some decisions confuse notions of the lawyer's role and the defendant's right to testify when faced with this problem. In *United States v. Curtis,* 742 F.2d 1070 (7th Cir. 1984) the Seventh Circuit held that the defense lawyer did not render ineffective assistance of counsel when he refused to allow the defendant to testify perjuriously in a robbery prosecution. In post-conviction proceedings, the defense lawyer testified that in pretrial conferences the defendant admitted his participation in the robbery and intended to testify to an alibi. Holding that the defendant has a fundamental constitutional right to testify as a matter of due process of law the court ruled that this right may be exercised by the accused with the exception of the situation in which the accused intended to testify falsely. The Court reasoned that there is no constitutional right to testify "perjuriously in his own behalf." *Id.* at 1076.

Based on the rationale of *Curtis* Petitioner urges this Court to require the defense lawyer to take affirmative steps which effectively incriminate and harm the client.

Without doubt, *Curtis* poses the most difficult problem for the defense lawyer when the client squarely and clearly indicates that perjury will be committed.

Curtis' holding appears reasonable and convincing if its assumptions are not carefully analyzed. It is certainly true, and it is hard to argue with the abstract proposition expressed in *Harris v. New York,* 401 U.S. 222,. 225 (1971), that the defendant has no right to commit perjury. This statement does not mean, as *Curtis* holds, that if a client intends to testify perjuriously, (the "perjury" conclusion being that of the lawyer), that the defendant should be foreclosed from exercising the fundamental right to testify. This phrase as applied in *Harris, infra,* means that if a defendant testifies to matters which are inconsistent with prior statements obtained in violation of his due process rights, then he may be cross-examined, using those unconstitutionally obtained statements. In addition, this phrase means that if the defendant testifies falsely at his trial, then the fundamental right to testify will not operate as a constitutional shield precluding prosecution for perjury, nor will the constitutional right to testify preclude the court's enhancement of his sentence if the Court believes that the testimony was perjurious. *See, United States v. Grayson,* 438 U.S. 41, 50 (1978). Both perjury prosecution and sentence enhancement are appropriate remedies for false testimony.

If the proposition that the defendant has no right to commit perjury is applied to situations *before* the defendant in fact testifies, then defense counsel is placed in an unconstitutional conflict of interest position with the client. Defense counsel is forced to make the final judgment about whether a client is going to commit perjury. Effectively, in making this judgment, defense counsel, and

not the client, is making the determination of whether the client will forfeit his fundamental right to testify. Further, Petitioner argues that it is appropriate for defense counsel to inform the court of the intended perjury and threaten to testify against the client should the client insist on testifying falsely. All of these actions place the lawyer squarely in the role of judge, far beyond the role of an advocate, and force the lawyer to be an adversary of his client. The conclusion and judgment that the client's testimony *was* perjurious must be made by participants of the criminal justice system, *e.g.*, the prosecution, the courts, and law enforcement, and not by the accused's own advocate, his or her lawyer.[9]

By urging this court to adopt a constitutional standard articulating the role of the defense counsel as an advocate with respect to the perjurious client dilemma, Amicus does not mean to suggest (1) that defense counsel do anything which encourages a defendant to testify falsely, or (2) that defense counsel should in any fashion refrain from expressing to the client negative and critical assessments with respect to his or her clients' testimony. The concept of reasonably competent assistance of counsel certainly includes the obligation of the criminal defense lawyer to assess realistically the impact of the client's proposed testimony. Advice of counsel, however, should not and must not include the power to forfeit the client's right to

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[9]As a practical matter this judgment, except in the rarest of cases, is virtually impossible to make. The facts of *Whiteside* serve to show how hard a judgment it is – the demarcation between a new honest recollection of a past event and one fabricated for the purpose of testifying falsely is, at best, difficult to distinguish. The requirements that the defense advocate make this distinction place a judicial responsibility on the part of the defense lawyer which should not be his or hers.

testify. As is discussed in more detail in Section II of this Brief, defense counsel has the professional duty to dissuade and persuade the client who intends to testify falsely and then, if unsuccessful, to move to withdraw from representation. However, when the advocate is forced to judge the truthfulness of a client's intended testimony, the attorney-client relationship is shattered, the client's constitutional rights are impaired and the independence of one of the three branches of the adversary system – defense counsel, is significantly eroded in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II. THIS COURT SHOULD GUIDE THE CRIMINAL DEFENSE ATTORNEY FACED WITH CLIENT PERJURY IN ORDER TO GIVE THE LAWYER THE RIGHT AND POWER TO COMPLY WITH THE LAW WITHOUT THE RISK OF HARMING THE CLIENT, INCURRING A MALPRACTICE SUIT OR A FINDING OF INCOMPETENCY.

The perjurious client dilemma does not arise often,[10] but when it does, it is one of, if not the most difficult, situations in the practice of criminal law.[11] Lawyers are caught between difficult-to-discern ethical responsibilities, *see*

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[10]See argument 1., *supra; Whiteside v. Scurr*, 744 F.2d at 1328.

[11]A solution to the perjurious client problem is currently nonexistent. Many commentators have debated the dilemma, beginning nearly twenty years ago. *See*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). A decade later, another law review piece, Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809 (1977) collected dozens of authorities on the debate. Dozens more exist today. *See, e.g.*, Rotunda, *The Notice of Withdrawal and New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455, 455-56 n.2 (1984).

supra, the representation of a client (like no other client, no other witness, in any other type of case) with the right to testify. *See Wainright v. Sykes,* 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring); *Whiteside,* 744 F.2d at 1329-30 (and cases cited therein), and constitutional constrictions on counsel's words and actions, imposed by cases like *Whiteside, Lowery,* and *Wilcox.*

Defense lawyers are in need of guidance and protection from this Court when faced with this dilemma.[12] The need is particularly acute for court-appointed counsel who may lack the economic clout of the retained attorney who is able to prevent false testimony by the threat of withdrawal. If the defense lawyer follows the narrative technique and abridged closing argument recommended by the former Defense Function Standard 7.7 and its proposed successor standard 4-7.7 he or she effectively labels client a perjurer to both judge and jury.[13] This is a treacherous course for the defense lawyer to follow because the client may receive an enhanced sentence if convicted; (In *Grayson, infra,* 438 U.S. 41, 50, this Court approved an increased sentence because "truthfulness or mendacity . . . has been deemed probative of . . . prospects for rehabilitation"). Further, depending upon the circumstances, the

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[12]This discussion assumes that the defense counsel does "know" that his client's proposed testimony will be perjurious because "the defendant [has] admitt[ed] incuplatory facts to his lawyer which are corroborated by the lawyer's own investigation." Defense Function Standard 7.7(a) commentary (withdrawn, 1979).

[13]Both ABA standards prohibit the lawyer from revealing the intended perjury to the court when counsel moves to withdraw. Proposed Standard 4-7.7 made explicit what was implicit in the original Standard 7.7 that where the lawyer seeks to withdraw "the court should *not* be advised of the lawyer's reason for doing so." ABA Project on Standards for Criminal Justice, *The Prosecution and the Defense Function,* Proposed Defense Function Standards 4-7.7(b) at 95.

lawyer may be sued for malpractice or be the subject of a judicial finding of incompetence.

If the defense lawyer follows the approach suggested by the ABA Amicus Brief in this case, which urges the defense lawyer to inform the Court of the details of the intended perjury, his vulnerability is greater in degree and obviously, worse, than if he follows the former ABA approach.[14] Under either course of action, the old ABA or

[14]N.A.C.D.L. is concerned that the ABA Amicus Brief may mislead this Court with respect to ABA policy on the very important issue posed by this case:

1. N.A.C.D.L. submits that the ABA has *no* policy on the critical issue which must be decided in this case: whether the actions of defense counsel denied his client effective assistance of counsel and due process of law.

2. The Model Rules of Professional Conduct in its Commentary to Model Rule 3.3 clearly indicates that in criminal cases when counsel is faced with the perjurious client dilemma, the model rules which require disclosure of client perjury *may* be subordinate to the advocate's duty under the Constitution:

   The definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions, these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement. *Model Rules of Professional Conduct and Code of Judicial Conduct* at 67 (1983).

3. The Proposed Final Draft of model Rule 3.3 makes even more clear the Rule was not intended to resolve the constitutional issue under consideration in this case. At the outset of the commentary, the Proposed Final Draft states in underlined, boldfaced capital letters: CAVEAT: CONSTITUTIONAL LAW DENYING THE RIGHT TO ASSISTANCE OF COUNSEL IN CRIMINAL CASES MAY SUPERSEDE THE OBLIGATIONS STATED IN THIS RULE.

   Proposed Final Draft: Model Rules of Professional Conduct at 125 (May 30, 1981).

the approach urged by the ABA amicus brief, if a defense lawyer, by verbal or non-verbal acts reveals or in any way refers to his own client's readiness to commit non-verbal acts reveals or in any way refers to his own client's readiness to commit perjury or the commission of perjury, he actively and effectively subjects the client to an enhanced penalty in the very case in which he is supposed to be acting on the client's behalf. He or she may also be sued for malpractice and run the risk of a finding of incompetency.

If the defense lawyer follows the approach recommended by Professor Freedman[15] then counsel may be the subject of formal disciplinary proceedings and/or accused of a crime.

In view of the conflicting constraints and consequences, this Court is urged to solve the heretofore insolvable matter of how a defense lawyer should react to a client who intends to perjure himself. As Judge Gibson, who dissented from the denial of rehearing en banc in *Whiteside* observed:

> The majority does not discuss the proper course for the lawyer in the position faced by Whiteside's counsel, which presents an extremely complex question. We should not attempt to resolve this issue in separate opinons. Consideration of counsel's dilemma is further reason for rehearing en banc, particularly in view of the conflicting academic discussions of this question. *See, Whiteside,* 744 F.2d at 1327.

Whiteside, 750 F.2d at 716 (Gibson, J., dissenting).

Accordingly, this Court is asked to adopt the following guidelines which approve conduct for the defense lawyer when faced with the rare situation of client perjury:

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[15]See citations in footnotes 11, 17 and 19.

(a) After the lawyer has been unsuccessful in dissuading the client from taking the stand to commit perjury the lawyer may seek to withdraw if and only if, by words and non-verbal acts,[16] the lawyer conveys no hint of the underlying reason for the withdrawal.[17]

(b) Disclosure of client communications, indeed of any client intent to perjure, is prohibited as it is at all odds with a criminal defendant's constitutional rights and the constitutional role of the advocate, (*see* argument I.B., *supra*,) and results in the lawyer visiting actual harm upon the individual he or she is charged with representing.[18]

(c) Should the trial court deny leave to withdraw, the lawyer should be permitted to proceed and represent the client as in any other case — with full right to question the accused on direct examination and with no prohibition

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[16]*See Whiteside,* 750 F.2d at 717 n.2 (Lay, C.J., concurring). Judge Lay recognized that "non-verbal acts may, in some circumstances, inform the court that the client is intending to give false testimony", *id* citing *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). Judge Lay concluded, however, that "[w]ithdrawal before trial, or when feasible, without advising the trial judge of the particulars of the situation, normally will not constitute an 'unequivocal announcement' depriving a defendant of his or her constitutional rights." *Id.,; Cf. State v. Lee,* 142 Ariz. 210, 689 P.2d 153 (1984) (suggesting withdrawal motions when necessary in the perjurious witness situation be made simply on the basis of irreconcilable conflict).

[17]*But see Lowery, supra*, in which the very act of withdrawal caused constitutional error. Withdrawal has been criticized, however, not only for signalling the judge that perjury is to occur, but because its end result, at best, is passing along the client to lie to the successor attorney. *See, e.g.*, Freedman, *Lawyer's Ethics in an Adversary System* at 33 (1975).

[18]*See Grayson, supra.*

against presenting argument of any fact in the record on summation.[19]

The narrative procedure ("tell your story to the jury, Mr. Defendant") and the abridged closing argument are techniques which decidedly destroy the non-disclosure principle; these suggested modes of proceeding with perjured testimony effectively telegraph to judges and juries that the lawyer believes, and knows, his client is a liar.[20]

It is considered unethical for a lawyer to express a "personal belief or opinion in his or her client's innocence," Defense Function Standard 4-7.8(b), and likewise it is considered unethical for the prosecutor "to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence on the guilt of the defendant." Prosecution Function Standard 3-5.8(b). The narrative approach and prohibition preventing argument of the client's testimony violate these professional standard norms which apply to criminal adversaries alike. Similarly, limiting counsel's closing argument prohibits counsel from performing the responsibility of advocacy to the client in summation which requires her or him to "argue all reasonable inferences from the evidence in the record," Defense Function Standard 4-7.8(a) and Prosecution Function Standard 3-5.8(a). The deletion and withdrawl of the Defense Function Standard 7.7(a) was based upon the sound conclusion that these techniques for dealing with the perjurious client problem caused as many problems as they were thought to

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[19]*See, e.g., Coleman v. Alaska,* 621 P.2d 869, 878, 881-82 (Alaska 1980), *cert. denied,* 454 U.S. 1090 (1981); *Freedman, supra* at 40-41; Comment, *Confidentiality and the Lawyer's Conflicting Duty,* 27 How. L.J. 329, 343-44 (1984).

[20]*See, e.g., State v. Lee,* 142 Ariz. at 219, 689 P.2d at 162 n.4; Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct,* 60 N.D.L. Rev. 261, 270-72 (1984).

solve. It is important to note that any case decided after the early part of 1979, which relies on these standards as official policy, does so in error.

It is time that criminal defense attorneys receive meaningful guidance, internally consistent direction they can follow in this complicated situation. No one favors or seeks to promote perjury, but a perjuror can be punished by the court before whom he commits the act, or under state and federal laws proscribing it.[21] The defense lawyer should not and need not be required to act adversely to his client's very rights and interests and abandon the constitutionally supported role of an advocate in order to protect his or her own position in our criminal justice system.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfuly requested to reverse the decision of the United States Court of Appeals for the Eighth Circuit to the extent that it presumes perjury would have occurred in the trial court but for counsel's theats against his own client, and remand the case for a new and fair trial. Alternatively, this Honorable Court is requested to affirm the result ordered by the Eighth Circuit that Emmanuel Charles Whiteside's lawyer deprived him of due process, effective assistance of counsel, and the right to testify by threatening to withdraw, disclose any projected perjury to the judge, and become a witness for the prosecution.

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[21] *See Whiteside*, 744 F.2d at 1328.

Further, this Court is strongly urged to adopt guidelines as suggested for the defense lawyer who is in fact faced with the client perjury problem.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 1985, I did place the following "Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent," in the United States mail, postage prepaid, and properly addressed as follows:

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